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In Search of Legitimacy: Restorative Youth Conferencing in Northern Ireland

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Restorative justice principles often feature prominently in peace agreements and initiatives to foster reconciliation and peace-building. As part of its own transitional process, Northern Ireland has undertaken a wide-ranging programme of criminal justice reform, whereby restorative practices have become a central response to juvenile offending. Drawing on a major evaluation of the Northern Ireland Youth Conferencing Scheme, this article suggests that restorative conferencing holds the potential to not only promote reconciliation between victims and offenders, it may even bolster the legitimacy deficit suffered by criminal justice institutions. Whilst it is vital that such schemes continue to foster their engagement with civil society and the wider community, the broader potential of restorative processes to contribute to post-conflict peace-building is considerable, especially in relation fostering a sense of legitimacy necessary for the operation of society and the institutions of the state.

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INTRODUCTION

One of the pivotal and most problematic aspects of peace-making in divided societies is the task of charting a course for criminal justice reform. In societies marred by conflict, criminal justice machinery often suffers from a legitimacy deficit, with a sizeable proportion of the population suspicious of state agencies and institutions which may be viewed as protagonists of the conflict. The quest for legitimacy in the criminal justice system, as the cornerstone of the rule of law, is rightly regarded as fundamental to any democratic settlement.¹ Indeed, a wholesale shift in values, processes and even personnel may be a prerequisite

¹ D. Tolbert and A. Solomon, 'United Nations Reform and Supporting the Rule of Law in Post-Conflict Societies' (2006) 19 *Harv. Hum. Rts. J.* 29; D. Marshall and S. Inglis, 'The Disempowerment of Human Rights-Based Justice in the United Nations' (2003) 16 *Harv. Hum. Rts. J.* 95.

for political negotiations to succeed.² Criminal justice reform has thus featured strongly as part of the transitional arrangements in both Eastern Europe and Latin America, albeit with various degrees of success,³ and Northern Ireland has been no exception. Since the foundation of the state in 1921, the police, courts and their surrounding processes were widely seen as a face of the British state. Despite various efforts over the decades to introduce enhanced transparency and accountability mechanisms, criminal justice institutions continued to be perceived in many Nationalist communities as instruments of oppression without any legitimate mandate.⁴ Thus, throughout the worst years of the 'Troubles', Republican and Loyalist paramilitaries responded to this legitimacy deficit by self-policing of their own areas through punishment beatings, shootings and banishments.⁵

Following the IRA ceasefire in 1994 and subsequent political negotiations, the opportunity to change the nature of policing and criminal justice arose following the Belfast Agreement of 1998. A fundamental review of the criminal justice system was established, with one of its core aims being to make the system more accountable through formulating 'recommendations for arrangements most likely to inspire confidence of all parts of the community in the future.'⁶ The proposed means of effecting this was through formulating a 'partnership between the criminal justice system, the community, and other external bodies.'⁷ To this

² See generally B. Oomen, 'Transitional justice and its legitimacy: the case for a local perspective' (2007) 25 *N.Q.H.R.* 141.

³ See D. Bayley, *Changing The Guard: Developing Democratic Police Abroad* (2006); M. Hinton, *The State On The Streets: Police and Politics in Argentina And Brazil* (2006), P. Messitte, 'Expanding the Rule of Law: Judicial Reform in Central Europe and Latin America' (2005) *Wash. U. Global Stud. L. Rev.* 617.

⁴ See generally A. Mulcahy, *Policing Northern Ireland* (2006).

⁵ K. McEvoy and H. Mika 'Restorative Justice and the Critique of Informalism in Northern Ireland' (2002) 42(3) *Br. J. Crim.* 534.

⁶ Criminal Justice Review Group, *Review of the Criminal Justice System* (2000), p.7.

⁷ *Ibid.*, p. 30.

end, the Criminal Justice Review (CJR) sought to maximise the concept of participation within the criminal justice system. In total, the Review made 294 recommendations for change across the criminal justice system. Many of these proposals have been the source of ongoing political tensions, particularly in relation to policing and demilitarisation. However, in contrast to these relatively highly charged political issues, considerably less attention has been paid to the radical changes to the system of youth justice. The CJR Group recommended that a restorative justice approach should be adopted in all cases involving young persons aged 10 to 17.⁸ In opting for a model based loosely around the New Zealand system of youth conferencing, the framers of the CJR sent a signal that they wished to maximise participation within the criminal justice system as a means to boosting legitimacy. That option, however, was certainly not risk free. At the time of implementation, New Zealand itself was the only jurisdiction to have adopted a mainstream statutory approach to using restorative justice with juveniles.⁹ Although that system appeared to be operating smoothly, New Zealand was a relatively settled society in stark contrast to Northern Ireland. Thus, if sections of either the nationalist or unionist communities were to come to view the youth conferencing arrangements as a state tentacle of either surveillance or social control,¹⁰ any prospect of it enhancing legitimacy could rapidly disappear. If, by contrast, it was perceived as a genuine means to devolve a sense of ownership of disputes to local communities, it could act as a powerful catalyst in building trust in the new institutions.

⁸ Ibid., 205.

⁹ In England and Wales referral orders are also mandatory for many first-time minor offenders. However, the extent to which they the scheme can be described as 'restorative' is questionable. See further J. Dignan, 'Juvenile justice, criminal courts and restorative justice' in G. Johnstone and D. Van Ness (eds), *Handbook of Restorative Justice* (2006).

¹⁰ See further S. Cohen, *Visions of Social Control* (1985). Cohen warns of a trend whereby centralised institutional surveillance is being gradually replaced by a "carceral archipelago" of "community-based" initiatives (at p.42).

This article explores the extent to which the restorative conferencing arrangements might both reflect and propel the legitimising objectives of the CJR. We begin by reviewing the idea of 'legitimacy', and contend that the restorative paradigm is both structurally and normatively better geared than retributive approaches for the purposes of peace-building and forging links between the state and civil society. We proceed to consider the significance of data we collected as part of a major evaluation of the youth conferencing programme.¹¹ Although the research did not specifically seek gather empirical data on perceptions of the legitimacy of the state, a reanalysis shows there is evidence to suggest broad levels of participation and engagement in the process by the wider community. Furthermore, as part of the research we conducted interviews with practitioners in the Youth Conferencing Service, and a range of stakeholders and local community representatives¹² to assess levels of community engagement following the evaluation. On this basis, we contend that the model holds considerable legitimating potential for the state by broadening engagement and participation in the delivery of justice.

THE QUEST FOR LEGITIMACY

The fact that the Criminal Justice Review placed such an emphasis on the concept of legitimacy should not surprise us. In Northern Ireland, as in any transitional setting, the State has traditionally struggled to harness the support of a significant proportion of the population. From a purely moral standpoint, criminal justice systems should protect core values of fairness, impartiality, and

¹¹ C. Campbell, R. Devlin, D. O'Mahony, J. Doak, J. Jackson, T. Corrigan, and K. McEvoy, *Evaluation of the Northern Ireland Youth Conferencing Service* (2006).

¹² These interviews included a range of stakeholders, from the police, Public Prosecution Service, Northern Ireland Office, Probation Board and representatives operating community based restorative programmes in both loyalist and republican areas of greater Belfast.

accountability; all of which were perceived to be problematic by a sizeable proportion of the population throughout the years of conflict.¹³

Defining 'Legitimacy'

Before proceeding to discuss the ways in which the new youth conferencing arrangements embody such values, it may be worth exploring what we mean by the concept of 'legitimacy' in greater depth. As Fallon observes, there are essentially three approaches to defining the concept.¹⁴ On the one hand, legitimacy may be viewed through a normative lens, focusing on the moral standpoint of whether a regime, legal system, law, process or institution conforms to a set of external standards (such as democracy, human rights frameworks, or general principles, such as the rule of law or separation of powers).¹⁵ Secondly, legitimacy may rest on the legal nature of a particular action. If a piece of legislation becomes law in the proper way, or judicial decisions are made correctly and do not violate any precedent or statute, they will be deemed to be legitimate in the eyes of law.¹⁶ Thirdly, legitimacy can also be defined from the standpoint of sociology or social psychology as a claim of popular consent. Such consent is derived less from a sense of fear of penal sanction, than the fact that most people believe that the law and its processes have a moral authority per se,

¹³ See generally J. Ruane and T. Todd, *The Dynamics of Conflict in Northern Ireland: Power, Conflict and Emancipation* (1996)

¹⁴ R. Fallon, 'Legitimacy and the Constitution' (2005) 118 *Harv. L. Rev.* 1787.

¹⁵ Political theorists have largely adopted such an approach in searching for indicators of legitimacy, and have been reticent to speak about 'legitimacy' in circumstances where the rulers, policies, or constitutions are considered morally unacceptable. See further R. Barker, *Political Legitimacy and the State* (1990).

¹⁶ Thus, unlike moral or political legitimacy, legal legitimacy does not depend on any external normative values. However, one major limitation of a purely legal approach is that law can provide a veneer of technical legality to practices that might otherwise be regarded as illegitimate: M. O'Rawe, 'Human rights, transitional societies and police training: legitimating strategies and delegitimizing legacies' (2007) 22 *St. John's J. Legal Comment.* 199, 207. This mirrors the generic distinction between moral and legal authority proposed by J. Raz, *The Authority of Law* (1979), see esp. ch. 2.

and ought to be obeyed for that reason. Legitimacy within this context represents an 'acceptance by people of the need to bring their behaviour into line with the dictates of an external authority'.¹⁷

It is this latter conception of legitimacy that is of particular relevance in peace-building and law-making in post-conflict societies, and it is the approach that we adopt in analysing the roll-out of the youth conferencing arrangements. As Tyler showed in a seminal empirical study, legitimacy as a claim of popular consent is often an important factor in citizens accepting a sense of obligation to obey the law as well as acknowledging the moral authority of rulers to make and enforce the law.¹⁸ According to Tyler, people's experiences with fair procedures will make it more likely that they will desist from offending; his study found that fair treatment was associated with values such as 'representation, honesty, quality of decision, and consistency, and more generally of participation and esteem'.¹⁹ At an individual level, everyday encounters and interactions between authority and citizenry can help foster a sense of fairness. In this way, the law creates a set of social norms that are largely accepted as 'fair' by the society so that a sense of shame is created by breaking them.²⁰ In spite of some initial scepticism towards his work, subsequent research conducted by Tyler and his colleagues would since appear to affirm a strong correlation between perceptions of procedural fairness and the willingness of the citizenry to cooperate with state agencies and public policies.²¹

¹⁷ T. Tyler, *Why People Obey the Law* (1990), p.25.

¹⁸ Ibid. Of course, acknowledging the right of an authority to create rules does not necessarily imply agreement with the substance of those rules.

¹⁹ Ibid., p175.

²⁰ See further J. Sunshine and T Tyler, 'The Role of Procedural Justice and Legitimacy in Shaping Public Support for Policing' (2003) 37 *L. & Soc. Rev.* 513.

²¹ For an overview of the literature, see generally Tyler, T. et al, 'Legitimacy and Criminal Justice: International Perspectives' in T Tyler, (ed) *Legitimacy and Criminal Justice* (2007); see also R. MacCoun, 'Voice, Control and Belonging: The Double-Edged Sword of Procedural Fairness' (2005) 1 *Ann. Rev. Law & Soc. Sci.* 171.

Thus, where a legitimacy deficit arises, a gap opens between the social norms and values of the state and its citizenry. Moreover, it becomes self-evident that the criminal justice system cannot operate with maximum effectiveness: not only will individuals be less likely to obey the law; but offences may not be reported to the police; witnesses may be reluctant to assist or testify at court; and prevailing suspicion will prevent information being passed to the authorities. In effect, the practical power of the state to investigate and prosecute crime and maintain law and order is compromised. Within the context of a transitional environment such as Northern Ireland, the need for legitimacy is even more pressing than in a 'settled' society since it is interlinked with the broader task of establishing peace and democratic governance. As Walker and Telford suggested in their Report to the Northern Ireland Criminal Justice Review Group:

'Public acceptance, confidence and support... are social incidents of legitimacy... Because criminal justice is crucial to the security of the state, and because criminal justice is integral to the state's project of governance, the criminal justice system has become central to the political and constitutional integrity of the state - a generally recognised and jealously guarded incident of its sovereign authority.'²²

Throughout the years of the 'Troubles', a significant section of both the nationalist and loyalist communities struggled to support and express confidence in the criminal justice system.²³ In order for political progress to be matched by inter-communal reconciliation, it was vital that the new criminal justice arrangements were perceived as being fair and morally correct within both communities.

²² N. Walker and M. Telford, *Designing Criminal Justice: The System in Comparative Perspective, Report 14, Review of the Criminal Justice System in Northern Ireland* (2000), pp.53-55.

²³ See generally J. McGarry and B. O'Leary, *Explaining Northern Ireland* (1995); J. Ruane and T. Todd, *The Dynamics of Conflict in Northern Ireland: Power, Conflict and Emancipation* (1996), esp pp56-70; see also O'Rawe, op. cit., n.17.

Indeed, as both the Belfast Agreement and the CJR came to acknowledge, human rights norms and principles of best practice such as accountability, transparency and due process had to lie at the forefront of any reform package. In this sense, the idea of legitimacy may be best thought of as a composite objective since it ultimately hangs on the realisation of other objectives.²⁴

Since the legal and social science approaches to defining legitimacy both refrain from casting moral judgments on the nature of the laws or regimes under scrutiny, some have suggested that the stance may be morally complicit in tyranny and the abuse of power.²⁵ As Fallon acknowledges, however, it is incorrect to view the normative and pragmatic approaches through discrete lenses as both constitute different modes of analysis. Indeed, Beetham draws from both approaches in defining power relationships as legitimate 'not because people believe in its legitimacy, but because it can be justified in terms of their beliefs'.²⁶ In Beetham's view, legitimacy contains three components: conformity with the rule of law; the justification of those rules by reference to congruent beliefs of the state and its citizenry; and evidence of consent by the citizenry. Thus Beetham's idea of legitimacy depends not solely on empirical inquiry, nor upon normative measurements, but rather seeks to evaluate whether a particular system conforms to the readily accepted political and cultural norms of any given society. While Beetham's understanding of legitimacy is not without its critics,²⁷ it does serve to illustrate that both social science and moral philosophy have a role to play in measuring legitimacy.

In light of these analyses, this article discusses a number of components of the youth conferencing arrangements which may contribute to the extent to which the

²⁴ Walker and Telford, op. cit., n.23, p.54.

²⁵ J.H. Schaar, *Legitimacy in the Modern State* (1981); see generally R. Barker, *Legitimizing Identities: The Self-Presentations of Rulers and Subjects* (2001).

²⁶ D. Beetham, *The Legitimation of Power* (1991), p11.

²⁷ See eg R. O'Kane, 'Against legitimacy' (1993) 41 *Pol. Studies* 471.

new criminal justice system in Northern Ireland might be considered legitimate. Since understandings of legitimacy vary considerably, for the purposes of this article we do not purport to evaluate the extent to which the new youth conferencing arrangements constitute a 'legitimate' arrangement when measured against any external or moral criteria. The normative legitimacy of certain aspects of the criminal justice reforms (most notably in respect of policing) has been dealt with elsewhere.²⁸ We approach the question of legitimacy primarily from a social science standpoint, asking to what extent the new arrangements might potentially be perceived to be legitimate in the eyes of individuals who have participated in the process and more broadly those communities who have traditionally struggled to accept state-led criminal justice processes. However, in recognition of the fact that social science constructs of legitimacy cannot be entirely divorced from normative questions, the article also considers the extent to which some of the core values at the centre of the transition are reflected in the new youth conferencing arrangements. Overall, our intention here is to illustrate how one particular criminal justice initiative may contribute, albeit in some small way, towards building popular consent in criminal justice governance.

The Legitimizing Potential of Restorative Justice

A further quandary that arises in relation to the concept of legitimacy stems from the fact that the term tends to connote a static and definitive state. Clearly, an active process is required to bring about this state, which is commonly labelled 'legitimation'. As O'Rawe contends, there is a clear need with any such process to assess the 'capacity of traditional criminal justice approaches to contain and effectively harness the challenges of human rights and pluralism in a period of

²⁸ See eg A. Mulcahy, above n 4; N. Walker, *Policing in a Changing Constitutional Order* (2001); G. Ellison, 'A Blueprint for Democratic Policing Anywhere in the World? Police Reform, Political Transition, and Conflict Resolution in Northern Ireland' (2007) 10 *Police Quarterly*, 243; M. O'Rawe, 'Transitional Policing Arrangements in Northern Ireland: The Can't and Won't of the Change Dialectic' (2003) 26 *Fordham Int'l L. J.* 1015, above n 17; K. McEvoy, 'The Agreement, Prisoner Release and the Political Character of the Conflict' (2000) 27 *J.L.S.* 542.

transition'.²⁹ Indeed, rolling out entirely new practices (as opposed to merely recycling longstanding rules) carries the added benefit of being able to channel new normative values and outlooks into society at large.³⁰

In western criminal justice systems, criminal offences have been long construed as transgressions against the state.³¹ Crime is said to constitute behaviour that is deemed to be so wrong that it ought to be deserving of public denunciation and censure. The state thereby enjoys a notional sense of ownership of criminal justice,³² notwithstanding that crime as a social construct reflects underlying relationships of power and domination. By contrast, restorative justice views crime primarily as a breakdown between private relationships. Ownership is thus devolved to a broader range of stakeholders, including the victim, the offender and the community. Proponents of restorative justice thus frequently contend that the restorative paradigm may carry wider societal effects reverberating beyond the direct participants in a particular mediation or conference setting. Sullivan and Tifft, for example, speak of the 'transformative potential' of restorative justice as it penetrates various different sets of social relationships.³³ Similarly, Bazemore and Schiff argue that restorative processes can be used to strengthen and rebuild social relationships, affirm community norms, and provide an opportunity for stakeholders to work together to realise a collective vision and set down their own norms of acceptable and unacceptable conduct.³⁴ Indeed, outcomes as well as processes are likely to benefit from community participation, since conference

²⁹ M. O'Rawe, op. cit n.17, p.202.

³⁰ R. Teitel, *Transitional Justice* (2000), p. 217.

³¹ See further N. Christie, 'Conflicts as Property' (1977) 17 *Br. J. Crimin.* 1.

³² H. Zehr, *Changing Lenses* (1990).

³³ D. Sullivan and L. Tifft, *Restorative Justice: Healing the Foundations of Our Everyday Lives* (2005).

³⁴ G. Bazemore and M. Schiff, 'Understanding restorative community justice: What and why now?' in G Bazemore and M. Schiff (eds), *Restorative Community Justice* (2001). See also S. Olson and A. Dzur 'Revisiting Informal Justice: Restorative Justice and Democratic Professionalism' (2004) 38(1) *Law and Soc Rev* 139.

agreements may have an additional degree of moral authority that sanctions imposed by the courts would not have carried. In this way, the downward devolution of criminal disputes may also directly contribute to societal reconciliation in a post-conflict environment through conferring a sense of civic ownership of disputes on both individuals and local communities.

In terms of building legitimacy in a divided society, there is thus something inherently attractive in adopting restorative justice models, as opposed to state-centred or retributive models. Indeed, there is a strong paradigmatic overlap between the concepts of transitional justice and restorative justice: both approaches tend to emphasise similar values such as truth, accountability, reparation, reconciliation, conflict resolution and democratic participation. Moreover, both are conceived in terms of 'a form of dialogue between victims and their perpetrators rather than a punitive blame allocation exercise'.³⁵ This goes some way to account why restorative-based initiatives are increasingly used as tools to resolve macro-level conflicts in post-conflict societies such as in Latin America, South Africa and elsewhere.³⁶ Just as restorative justice values may work to resolve micro-conflicts between victims, offenders and their respective communities, they may also assist in boosting democracy and inter-communal

³⁵ R Teitel, 'Transitional Historical Justice' in L.H. Meyer (ed), *Justice in Time: Responding to Historical Injustice* (2003), p.80.

³⁶ See further M. Findlay, 'Decolonising Restoration and Justice: Restoration in Transitional Cultures' (2000) 39(4) *Howard J.* 398; R Aldana-Pindell, 'An Emerging Universality of Justiciable Victims' Rights in the Criminal Process to Curtail Impunity for State-Sponsored Crimes' (2004) 26 *H.R.Q.* 605. While the use of restorative justice initiatives (usually in the form of truth commissions) is fairly widespread, it can be noted that – in contrast to Northern Ireland – restorative justice has not permeated the formal criminal justice system of many of these societies. Programmes that have evolved, most notably in South Africa, tend to be of a localised nature and are community-led: see further See further A. Skelton, 'Africa' in G. Johnstone and D. Van Ness (eds) *Handbook of Restorative Justice* (2007); D. Roche, 'Restorative Justice and the Regulatory State in South African Townships' (2002) 42 *Br. J. Crimin.* 514. For the most part, they receive little or no support from the state and remain on the periphery of the criminal justice system.

healing through forging better relationships between civil society and the various faces of the formal criminal justice system. Cunneen has suggested that the proliferation of restorative programmes in Australia has been instrumental in opening new pathways of communication between indigenous peoples and 'institutions of the colonizer', thereby helping to forge a new depoliticised understanding of the role of law and justice.³⁷ By offering indigenous communities a direct input into justice processes, Cunneen contends that long-standing suspicions have been broken down and new channels of co-operation have been opened. As a result, the working culture of criminal justice professionals is likely to change, and the capacity of citizens and local communities to address crime effectively is likely to be increased.³⁸

Even in more settled societies, commentators have pointed to the potential of restorative justice to reinvigorate democracy by creating new community bonds and strengthening existing ones.³⁹ Through its emphasis on the importance of procedural justice, empirical research has consistently shown that both victims and offenders report higher levels of satisfaction with restorative mechanisms than with the conventional criminal process.⁴⁰ Indeed, a recent pilot scheme

³⁷ C. Cunneen, 'Reviving restorative justice traditions?' in G. Johnstone and D. Van Ness (eds) *Handbook of Restorative Justice* (2007). Cunneen cites the example of the Queensland Murri Court, where indigenous elders sit on the bench alongside magistrates and have an input into the sentencing process. Some offenders will thus receive customary punishments or work within the community as alternatives to a prison sentence. See also C. Cunneen, 'Restorative Justice and the Politics of Decolonization' in G.E. Weitekamp and H-J. Kerner, *Restorative Justice: Theoretical Foundations* (2001).

³⁸ See G. Bazemore and M. Schiff, *Juvenile Justice Reform and Restorative Justice: Building Theory and Policy from Practice* (2004), ch.7.

³⁹ A. Alfieri, 'Community prosecutors' 90 Cal. L. Rev. 1465 (2002). See also J. Braithwaite, and C. Parker, 'Restorative Justice is Republican Justice' in G. Bazemore and L. Walgrave (eds), *Restorative Juvenile Justice* (1999); J. Braithwaite, 'Building Legitimacy Through Restorative Justice' in T. Tyler (ed), *Legitimacy and Criminal Justice: International Perspectives* (2007).

⁴⁰ See eg J. Latimer, C. Dowden, & D. Muise, *The Effectiveness of Restorative Justice Practices: A Meta-analysis* (2001); G.Luke and B. Lind, *Reducing Juvenile Crime: Conferencing versus*

evaluated by the New Zealand Ministry of Justice found that a third of victims who participated said they felt better about the criminal justice system generally following participation in a restorative conference.⁴¹ This would tend to support Tyler's thesis, in that one positive experience with a particular aspect of the criminal process can be instrumental in building trust and confidence in the system as a whole.

Some commentators have gone so far as to call for the law to be reconceived as a communicative act in order to create a more participatory form of criminal justice for those who have traditionally felt alienated from established legal processes and institutions.⁴² Indeed, Cordella has argued that a communicative conception of law 'is a dyadic process that facilitates dialogue between community and transgressor', which should allow communities to acknowledge their differences and identify transgressions as disputes among members.⁴³ While restorative mechanisms are not the only means of facilitating such communication,⁴⁴ it is undoubtedly the case that, in sharp contrast to conventional criminal justice processes, they maximise the potential for meaningful dialogue between victims, offenders and the community. Moreover, through opening this new space for communication, it is conceivable that restorative justice models may act as a social catalyst for broader inter-

Court (2002); B. Poulson, 'A Third Voice: A Review of Empirical Research on the Psychological Outcomes of Restorative Justice' (2003) 1 *Utah L. Rev.* 167; G. Maxwell, V. Kingi, J. Robertson, A. Morris and C. Cunningham, *Achieving Effective Outcomes: Youth Justice in New Zealand* (2004); L. Sherman, H. Strang, C. Angel, D. Woods, G. Barnes, S. Bennett, and N. Inkpen, 'Effects of face-to-face restorative justice on victims of crime in four randomized controlled trials' (2005) 1 *Journal of Experimental Criminology* 367.

⁴¹ New Zealand Ministry of Justice, *Court-Referred Restorative Justice Pilot: Evaluation* (2005).

⁴² T. Mathiesen, *Prisons on Trial: A Critical Assessment* (1990).

⁴³ P. Cordella, 'Sanctuary as a refuge from state justice' in D. Sullivan and L. Tifft (eds), *Handbook of Restorative Justice: A Global Perspective* (2006).

⁴⁴ See A. Duff, 'Restoration and retribution', in A. von Hirsch, A. Roberts, A. Bottoms, K. Roach, and M. Schiff (eds), *Restorative Justice and Criminal Justice* (2003).

communal reconciliation. In short, the ideology that underpins the restorative paradigm broadly reflects the core values that may contribute to a process that could help to propel and sustain the political transition in Northern Ireland.

YOUTH CONFERENCING IN PRACTICE

It is perhaps inevitable that any new system rooted within the Northern Ireland criminal justice system would face a formidable challenge in seeking to counter the mistrust of the state that has been a source of the legitimacy crisis in the first instance. Whilst the above discussion highlights a growing acknowledgement of the potential for restorative paradigms to bolster democratic values, the question that arises is whether the law and practice that underpins the youth conferencing arrangements reflects this normative capacity. The following, therefore, examines the extent to which the youth conferencing process has been successful in achieving some of the broad objectives of making justice more open, devolved, accountable and legitimate, and in fostering greater participation and 'community building'. This is achieved through an examination of the conferencing process itself, the views of the participants and an analysis of the outcomes and plans derived from conferences.

The analysis provided is based on a re-analysis of our findings from a major evaluation of the scheme in which 185 youth conferences were observed and interviews were conducted with 171 offenders and 125 victims who attended conferences.⁴⁵ The data has also been supplemented by interviews with practitioners in the Youth Conferencing Service and a range of stakeholders and local community representatives. Whilst the original research was aimed at assessing how the Youth Conferencing arrangements were working in practice,

⁴⁵ See C. Campbell, R. Devlin, D. O'Mahony, J. Doak, J. Jackson, T. Corrigan, and K. McEvoy, *Evaluation of the Northern Ireland Youth Conferencing Service*. Northern Ireland Office, Research and Statistical Series: Report No. 12 (2006).

the data also provides an opportunity for us to consider the question of how it might contribute to the broader agenda of increasing legitimacy and participation.

The Statutory Conferencing Process

The conferencing model introduced in Northern Ireland is very different from restorative initiatives developed elsewhere in the United Kingdom.⁴⁶ It places restorative principles at the heart of the youth justice system and uses conferencing as the main avenue for dealing with young people who offend. By comparison, in England and Wales the only similar restorative based measure available is the referral order. While these are mandatory for many first-time offenders, they are largely restricted to less serious offences. Furthermore, the extent to which the referral order can be described as 'restorative' is questionable. Research has shown that referrals have minimal victim involvement and the extent to which they deliver 'restorative' outcomes is questionable.⁴⁷

The Justice (Northern Ireland) Act 2002 introduced the restorative youth conferencing model and provided for the establishment of an independent Youth Conferencing Service to organise and facilitate conferences. The legislation established two types of conferences; those that are diversionary in nature (and are ordered by the Public Prosecution Service), and those that are intended to substitute traditional punitive sentences (and are ordered by the court). Both forms of conference take place with a view to providing a recommendation to the prosecutor or court as to how the young person should be dealt with for their offence.

Diversionary conferences are convened following referral to the Youth Conferencing Service from the Public Prosecution Service. The prosecutor is expected to make a referral in those cases where they would otherwise have

⁴⁶ See above n 9.

⁴⁷ See further, J. Dignan, 'Juvenile justice, criminal courts and restorative justice' in G. Johnstone and D. Van Ness (eds), *Handbook of Restorative Justice* (2006).

instituted court proceedings. Thus, conferencing is not intended as a prosecutorial disposal for first time offenders or those committing petty offences.⁴⁸ Rather, diversionary conferences are intended for young people who may have offended in the past or where formal action is deemed necessary, but short of referral through the courts. For the conference to take place, two preconditions must be met: the young person must admit to the offence and must consent to the process. If either of these conditions is not met, the young person will not be dealt with through this process and may be referred through the court for prosecution.

For court-ordered conferences, the young person is referred to conferencing by the court. Again, he or she must admit to the offence and consent to the process. If there is a dispute of the facts, these will be heard by the court and following a finding of guilt the case may only then proceed to conferencing. One distinctive feature of the Northern Ireland system is that the court *must* refer a young person to a youth conference; the only offences that fall outside the scheme are those which carry a penalty of life imprisonment, offences which are triable under indictment only, and scheduled (terrorism) offences.⁴⁹ The mandatory nature of the referrals highlights the intended centrality of conferencing to the youth justice process.

In terms of how conferencing operates in practice, the programme involves a meeting in which the young person is invited to reflect upon their actions and to interact with the victim and other relevant stakeholders. The conference is chaired by a professionally trained conference co-ordinator employed by the Youth Conferencing Service. The victim, who is encouraged to attend, can explain how the offence has impacted upon them and hopefully gain an understanding of why it occurred. Following a group discussion a conference

⁴⁸ Such persons should be dealt with by the police, either by way of warning and advice or a formal caution.

⁴⁹ Justice (Northern Ireland) Act 2002, s 59.

plan will be drawn up which takes the form of a negotiated 'contract' which is enforceable⁵⁰ and may require the offender to complete acts from reparation or compensation to the victim, participate in activities and programmes designed to address offending behaviour, or place restrictions on the young person's conduct or whereabouts.⁵¹ As with all other aspects of the process, any such agreement is voluntary and subject to the young person's consent. Whilst the nature of contracts inevitably varies, they are generally formulated with a restorative outcome in mind and will usually provide at least for some form of reparation which aims to provide monetary (or more often, symbolic) recompense to the victim and the community.

An Inclusionary Process?

Although the youth conferencing arrangements were clearly designed on paper to bolster participation, transparency and ultimately legitimacy of the youth justice system, it did not necessarily follow that they would do so in practice. The new scheme was firmly rooted in the criminal justice system. This was potentially problematic, since the legitimacy and moral authority of the criminal justice agencies - as apparatus of the state - is hotly contested by those in some of the communities in which they seek to serve.⁵² Thus from the moment of its inception, the Youth Conferencing Service faced something of an uphill struggle to garner support, particularly given history of conflict in Northern Ireland and mistrust of the State. These challenges were not overlooked by the framers of the CJR. Indeed, for their part, it was hoped that suspicions concerning the state-led

⁵⁰ Such 'contracts' are not enforceable as civil matters but as part of the sentencing procedure, thus a breach may result in the further criminal proceedings.

⁵¹ The potential range of possible elements in a conference plan is broad, but restricted by the provision that it must be completed within one year of the conference. A conference plan may even include a recommendation that the court exercise its powers by imposing a custodial sentence on the young person.

⁵² H. Mika and K. McEvoy, 'Restorative Justice in Conflict: Paramilitarism, Community, and the Construction of Legitimacy in Northern Ireland' (2001) 4 *Contemp. Just. Rev.* 291.

nature of the scheme might be counteracted by the inclusionary and transformative potential of the restorative paradigm.⁵³

As a starting point in analysing how the process operates, it can be noted that the statutory scope of the scheme reflects the desire of the CJR to encourage and facilitate broad participation. Under the Justice (Northern Ireland) Act 2002, the young person, the conference coordinator, a police officer and an appropriate adult must attend a conference.⁵⁴ The young person is entitled to have legal representation at the conference, but solicitors may only attend in an advisory capacity and cannot speak for the young person. The coordinator may also include anyone else who they feel may be 'of value' to the process, such as a community worker or someone who is likely to help the young person, either during the conference or as part of the conference plan. Thus, all of the 185 conferences observed included parents or guardians, and some included other supporters, such as social workers, probation officers or community workers, who had been working with or knew the young person. These individuals were encouraged to participate and support the young person and observations showed that 77% of supporters were engaged to at least some extent when discussing the crime. Many, by invitation of the co-ordinator, described positive aspects of the offender's life and several supporters were seen to actively step in if a young person experienced difficulties expressing themselves.⁵⁵

The contrast with how young people and victims are typically dealt with through the traditional court process is dramatic. The youth court is highly formalised and dominated by professionals, who generally speak for the parties. The structure of the court is very formal (albeit usually less formal than an adult court), with the defendant facing the bench, and the process is tied up in a strict and formal set of

⁵³ Criminal Justice Review, op. cit. n.6, p.190.

⁵⁴ Article 3A, Criminal Justice (Children) (Northern Ireland) Order 1998, as inserted by s57 Justice (Northern Ireland) Act 2002.

⁵⁵ Campbell et al, above n 13, pp.69-71.

legal procedures which are often experienced as exclusionary by those most directly affected by the crime. In court the offender rarely speaks, other than to confirm his or her name and the victim is usually excluded from the process unless they are required to give evidence.

Our observations of the restorative conferencing process showed it to be very different to the typical court experience for a young offender. By its very nature, the conferencing process seemed to facilitate participation from all those directly involved. The participants involved in the offence were encouraged to speak during conferencing and the young person, their family and victim were given the opportunity to express themselves and their needs, to explore the impact of the offence and to discuss how it affected them. The facilitator was generally able to encourage an open and democratic dialogue between participants and usually directed the process so everyone has the opportunity to have their say. Moreover, much work is put into preparing participants in advance of the conference, with meetings and home visits with offenders and victims, before the conference takes place. The process itself is usually comprised of two distinct parts in which there is firstly a discussion of the offence outlined by the police officer and then discussed by the offender and victim. The discussion then turns to consider what can be done to address the harm caused and to devise an agreed conference plan which will be signed by the participants to conclude the conference. In the following sections we explore the experience of the conferencing process from the perspective of the participants and the extent to which process the opened up participation and dialogue.

Victim Engagement

The victim of the offence is entitled to attend a youth conference, and even if they choose not to attend, they may still contribute to the conference either directly or indirectly. This could include a telephone link, a written statement, letter or tape recording in which the victim can express their views and describe how the crime impacted them. Our research showed that considerable efforts were made by the

conferencing service to include victims in the process and achieved rates of participation in conferences were high - over two-thirds (69%) of the conferences that were observed as part of the research were attended by a victim.⁵⁶ Of these victims 60% were 'surrogate victims' or 'victim representatives' and 40% were personal victims.⁵⁷ Victim representatives were usually volunteers from local shopping management groups or from victim support organisations. Whilst, from a theoretical perspective, it is perhaps too easy to dismiss the value of surrogates, in a practical context it should be borne in mind that victim representatives offer a useful way of injecting a victim's perspective into conferencing proceedings in those cases where actual victims are unavailable or reluctant to attend a conference. As part of the Northern Ireland scheme, victim representatives are most commonly used in cases such as shoplifting and criminal damage to public property, especially where it is difficult to identify or locate a victim, or in victimless offences.

The fact that slightly more victims who participated in conferences were victim representatives rather than personal victims is perhaps unsurprising. This broadly reflected the types of criminal behaviour for which the young offenders were prosecuted; such as property-related crime and criminal damage, rather than offences which involved direct victim contact, such as assault, theft from the person or robbery.⁵⁸ Whilst using victim representatives in such circumstances is

⁵⁶ This compares favourably with other restorative programmes internationally. Cf. Maxwell, G. and Morris, A. (2002) Restorative Justice and Reconviction. *Contemporary Justice Review*, 5(2), pp. 133-146; Crawford, A. and Newburn, T. (2003) *Youth Offending and Restorative Justice: Implementing Reform in Youth Justice* (Cullompton: Willan Publishing); O'Mahony, D. and Doak, J. (2004) 'Restorative Justice: Is more better?' *Howard Journal*, 43: 484.

⁵⁷ Campbell et al, above n 13, pp. 51-53.

⁵⁸ Most victim representatives attended conferences relating to offences of theft (39%) or criminal damage (30%), while the majority of personal victims (47%) were victims of assault. So-called 'victimless' crimes, such as drug-related offences, disorderly behaviour or driving offences made up a further 13% of the cases where a victim representative attended a conference.

less desirable than using an actual victim⁵⁹, the involvement of a representative was considerably better than no victim input at all. Moreover, the use of victim representatives often further opened up conferencing process by involving the wider community and business sector in the process, thus drawing in and engaging another section of the community in the process of delivering justice.

The potential for a more open and participatory form of justice was also evidenced by the fact that victims were able to bring supporters if they so wished. Whilst only seventeen victim supporters attended a conference,⁶⁰ all were observed to participate well and contribute to the discussion about the offence and its impact. Most of the victim supporters engaged directly with the young person and explained the impact of the offence on the victim and themselves. All of the victims attending with a supporter said they valued their presence and felt they helped them through the process. Some supporters were able to demonstrate that the impact of the crime went beyond the individual victim and affected their whole family and even the broader community.

As part of the research, victims were asked why they attended and their experience of the process. For many victims it provided an opportunity to understand why they had been victimised, the circumstances surrounding the event and the motivations of the offender. It was also an opportunity to hear what the young person had to say, having them explain themselves and to be able to question them. Furthermore, it provided an opportunity to show the offender the harm or damage they had caused and it gave the victim the opportunity to tell their side of the story and express their emotions and hurt. So, while many victims wanted the offender to understand and appreciate the harm they had

⁵⁹ There is some evidence from the RISE initiative in Canberra that using surrogate victims was perceived by young offenders as being less effective than using actual victims, in terms of the impact of their presence in the conference (Strang, H and Sherman, L. 2003 *Repairing the Harm: Victims and Restorative Justice*. Utah Law Review, Vol. 15 - 1, pp 15-42).

⁶⁰ Of 125 victims in total.

caused, a strong underlying theme was the need to understand the offender and their reasons for offending. Interestingly, few victims appeared to be drawn to the process as an opportunity for retribution or vengeance and 87% said one of the key reasons they attended was to 'help' the young person. These general findings have been supported by other studies which have shown victims in restorative encounters often want the opportunity to express their feelings to the offender and to have a say in resolving the problem, rather than seeking a punitive outcome.⁶¹

Though some victims were understandably nervous at the prospect of coming face to face with the offender, they were actually found to be much less nervous than the offenders and once the conference was underway levels of anxiety usually dissipated. The restorative process seemed to alleviate feelings of anxiety and appeared to provide the opportunity for all parties to participate and opened up what was often a genuine dialogue. Any anger and frustration that was expressed by victims in the conferences was usually directed at the incident and consequences of the crime, rather than the offender as an individual. As mentioned, it was apparent that most of the victims were not primarily interested in venting anger towards the offender, but were more concerned with putting the incident behind them. Most victims described their experience at the conference as positive and 83% were observed to be very engaged in the discussion. They were usually able to express themselves articulately and all of the victims interviewed said they had been given the opportunity to tell the offender how the incident had affected them. Furthermore, 91% of the victims felt the offender had listened to them.

Victims usually played an active role throughout the conferences and 83% were observed as 'very involved' in the process of devising the conference plan. Some

⁶¹ See for example Newburn et al (2002) in a study of Referral Orders in England and Wales and Hoyle et al (2002) who studied police-led restorative cautioning. Similarly, Strang (2002) found little evidence that victims sought punishment or more severe punishments in restorative encounters.

68% of victims interviewed following their conference said the conference plan was fair and 92% were satisfied with the outcome of the conference. Indeed most victims said they preferred the conference process than the prospect of going to court - only 13% said they would have preferred if the issue had been dealt with in court. A clear endorsement of the process from the victim's perspective was evidenced by the fact that 91% of victims said they would recommend the process to someone else in a similar situation. As such, the conferences appeared to provide a structure and process built around a restorative framework, which facilitated active victim participation, which was very often experienced as democratic, inclusive and satisfying.

Interestingly, one of the common arguments for excluding victims from the criminal justice process - especially from sentencing decisions – is the view that they have little to offer. It has been argued that victims may seek an agenda of retribution or vengeance or that they could be irrational, having been victimised, and are therefore unable to participate effectively.⁶² However, research into victim participation has consistently shown that vengeance is not high on the list of priorities for most victims and many are able to engage constructively in the process.⁶³

Offender Engagement

Since youth conferencing has been placed on a statutory footing and referral by the courts or prosecution service is mandatory, the types of offences for which offenders were dealt with included some serious criminal incidents. During the research 53% of offenders were referred for 'intermediate' offences including assaults, thefts and damage of between £50-250 and a further 24% were ranked as 'serious' offences including assaults causing bodily harm, robbery, vehicle

⁶² See e.g. C. Guastello, Victim Impact Statements: Institutionalised Revenge (2005) 37 *Arizona State Law Journal* 1321, Y. Buruma Doubts on the Upsurge of the Victim's role in Criminal Law, in H. Kaptein and M. Malsch (eds.) *Crime, Victims and Justice* (2004), Aldershot: Ashgate.

⁶³ See e.g. J. Doak and D. O'Mahony The Vengeful Victim? Assessing the Attitudes of Victims Participating in Restorative Youth Conferencing (2006) 13 *International Review of Victimology* 157.

thefts and burglary. Only 20% of offences referred for conferencing were ranked as 'minor' property offences, such as theft and criminal damage under £50.

As previously noted, though the referral process is mandatory, the consent of the offender is required for the process to take place. When interviewed, we found the majority of offenders wanted to attend and they gave reasons such as, wanting to 'make good' for what they had done, or wanting to apologise to the victim. The most common reasons for attending a conference were to 'make up' for what they had done, to seek the victim's forgiveness, and to have other people hear their side of the story. Only 28% of offenders stated they were initially reluctant to attend. Many offenders appreciated being given the opportunity to interact with the victim and wanted to 'restore' or repair the harm they had caused. Though many offenders who participated in conferences said they did so to avoid going through court, most felt it provided them with the opportunity to take responsibility for their actions and seek forgiveness.⁶⁴

Youth conferencing was by no means an easy option and most offenders found it very challenging. For offenders, the conferencing process held them to account for their actions, as they were required to explain to the conference group and victim why they offended. Offenders found the prospect of coming face to face with their victim difficult. For instance, 71% of offenders displayed some degree of nervousness at the beginning of the conference and 58% said they were very nervous when the conference began. Despite their nervousness observations of the conferences revealed that the vast majority of offenders (98%) were able to

⁶⁴ Recent follow-up research has also assessed the impact of the scheme on recidivism rates: D. Lyness, 'Northern Ireland Youth Re-offending: Results from the 2005 Cohort' (2008) *Research and Statistics Bulletin* 7/2008. These findings are encouraging and compare reconviction rates for young offenders given differing disposals, including custodial and community orders. The findings show those given restorative conferences had a lower one year reconviction rate (of 38%) than those given a custodial disposal (73%) or those given a community disposal (47%).

participate effectively in the conferencing process once it was underway and 93% were able to explain the offence and circumstances from their perspective.

The young offenders generally played an active part in the conferencing process and were not simply passive participants or observers. Interviews with offenders revealed that 95% felt they had been listened to and they appeared interested to hear what others had to say. Nearly all (97%) of the offenders accepted full responsibility for the offence and 86% of victims felt the young person had accepted responsibility for the offence. Similarly, the giving and receiving of an apology was a very important part of the restorative process for both offenders and victims. The apology, as a first step in making amends, was often a turning point in conferences. It allowed for a much greater degree of involvement, holding the young person to account, allowing for dialogue, and developing and gaining some level of mutual understanding. An apology was made in all but one of the conferences attended by a victim.

The direct involvement of offenders in conferencing and especially their ability to engage in dialogue again contrasts with the conventional court process. As noted, in court offenders usually do not speak other than to confirm their name, plea and understanding of the charges and are normally represented and spoken for by legal counsel throughout proceedings.⁶⁵ The conferencing process, therefore, was successful in opening up the delivery of justice and actively engaging offenders in a process of dialogue that was on the whole inclusive, democratic and encouraged participation.

Because the conferencing process involved young people they were required to attend with an appropriate adult, such as a parent or guardian. Furthermore, at the discretion of the co-ordinator, a supporter such as a social worker, or community worker, could be brought along to help the young person. This further opened up the process involving a wider circle from the young person's family

⁶⁵ See generally H. Zehr, above n 30.

and community. Observations showed that most supporters were usually able to feed constructively into the process and 77% were seen to be engaged in discussing the offence. Many supporters who accompanied the young people also spoke of feelings of regret, disappointment and shame which no doubt added to the restorative impact of the conference on the young person and 84% fed positively into the restorative atmosphere of the conference.

By any measure, the youth conferencing arrangements were successful in promoting levels of engagement and participation among both victims and offenders that were not previously in place under the former system of youth justice. Moreover, police officers, social workers, residential care workers, and professional co-ordinators regularly participated in conferences. The mandatory presence of the police officer was particularly significant given the context of Northern Ireland. Our research showed that having a police officer present at the conference often provided a rare opportunity for participants to engage with police officers. It allowed for a dialogue to take place, which was for some, capable of breaking down many of the strongly held barriers and hostilities towards the police. It often allowed police officers to be seen as individuals. This opening up and dialogue with police officers may even help foster a greater sense of respect for the police and the law, which was one finding of Sherman et al's evaluation of the police-led RISE project in the Australian Capital Territory.⁶⁶ Conferencing may thus have a further modest role to play in opening up the Northern Ireland criminal justice system in that young people from communities that have traditionally felt alienated and antagonistic towards the police may be able to put a 'human face' to individual officers. Certainly, during the worst years of the Troubles it would have been inconceivable that police officers and other 'state' professionals would come together in such an expansive forum.

Restorative Outcomes and Engagement

⁶⁶ L. Sherman, H. Strang, J. Barnes, et al., *Experiments in Restorative Policing: a progress report on the Canberra Reintegrative Shaming Experiments* (1998).

Beyond the engagement and participation of individuals, there is evidence that restorative youth conferencing brought about a level of inclusion and participation in the broader community by way of the outcomes or conference plans. This occurred at three levels. Firstly, as described earlier, all of those directly involved in the conference were able to play a role in devising the conference plan, including the victim, offender and various supporters. They were encouraged to contribute in a democratic manner, and victims, offenders and supporters were observed as playing an active role in devising conferencing plans and they reported that they felt included and satisfied with the process and outcomes.

On a second level, the types of disposals that were decided upon in conference plans often focused more on reconciliation, reparation and on helping the young person avoid offending in the future, than on simply punishing them. All of the plans were rated by the researchers according to whether they had aspects of reparation to the victim, whether there was help offered to the offender, whether there were elements of re-education or rehabilitation, or whether there were elements designed to punish the offender. It was found that over four-fifths (83%) of plans had elements designed to help the offender, such as mentoring or help with drugs and alcohol. Some 76% of plans had elements to provide reparation to the victim, such as monetary payments and 56% of plans had elements of re-education or rehabilitation like anger management or victim awareness. Only 27% of plans had elements designed to punish the offender, such as community service or restrictions on the young person and their whereabouts. The fact that conference plans focused considerably more on elements of reparation and reconciliation and less on punishment, reflected restorative nature of the process. By doing so the plans were also able to engage the offender in a process that was participatory and encouraged outcomes that were more positively focused on the needs of the offender, victim and community. Moreover, there appeared to be an emphasis on seeking positive goals for the future, rather than simply punishing for acts in the past – which often characterises a criminal justice response.

A third level at which the outcomes appeared to further the goals of extending participation, especially into the community, was evident in how the outcomes were delivered in practice. The use of community groups and local actors was very much a part of the delivery of conference plans. These included programmes provided in the community, such as drug and alcohol counselling sessions, victim and offending awareness sessions - conducted with the help of voluntary organisations like victim support - to personal development counselling through mentoring, as part of conference plans. The fact that a high proportion of plans included elements of education, support and personal development meant that there was considerable scope to engage with the broader community in the delivery of conference plans. Indeed, 86% of conference plans included activities and programmes which were provided through the community or voluntary sector.

Engagement with the Wider Community

For the scheme to be perceived as a fair and just response to crime, especially in those communities where criminal justice institutions have experienced the most suspicion and mistrust in Northern Ireland, it was vital that the Youth Conference Service forged dynamic and effective links with civil society (and elements within the most alienated communities). Before proceeding to analyse the nature and extent of these relationships, it is perhaps worth highlighting that the meaning of 'community' remains abstract, contentious and highly subjective.⁶⁷ While community involvement is generally perceived to be a *sine qua non* of restorative processes, and its very existence as a tangible entity appears to be an *a priori*

⁶⁷ In addition to social policy debates about the meaning of community, the term has come to take on a much more specific meaning among some proponents of restorative justice. The concept of 'micro communities' has emerged (or communities of care), and refers to a range of stakeholders that have emerged from the circumstances surrounding the offence and have developed in order to encourage, help and support those directly involved. See further O'Mahony and Doak, above n 13.

assumption. It is frequently conceptualised as a sociological construct used to describe an 'ephemeral quality of identification through connection with others'.⁶⁸ While there appears to be some consensus that the term confers a degree of interconnectedness with others,⁶⁹ care should be exercised in assuming that all members of a community will all hold common values and ideas.⁷⁰

Ironically, the conflict-ridden history of Northern Ireland has meant that society has been less exposed to wider globalised erosion of 'community' and certain community values have even been preserved or developed as a form of 'social cement'.⁷¹ As such, Northern Ireland has a strong history of energetic civil society and highly mobilised political communities, despite relatively high levels of socio-economic deprivation.⁷² On one level, a flourishing civil society base should create the optimum conditions for community participation in restorative initiatives. However, by the same token, it is vital that those communities who have traditionally been suspicious of state-led mechanisms perceive the new arrangements as being grounded within the spirit of transition. For that to happen, it is vital that some form of rapprochement take place between stakeholders from these communities and those charged with administering the criminal justice system.

One of the more disconcerting findings of the research was that there was very little evidence of co-operation with any of the community-led restorative

⁶⁸ Pavlich, op. cit., n.53, p.85.

⁶⁹ J. Braithwaite, *Crime, Shame and Reintegration* (1989), p.85.

⁷⁰ In relation to Northern Ireland, it was highlighted by O'Mahony et al that communities are themselves composed of a range of diverse individuals who often lack uniformity in terms of age, race, socio-economic profile, life experience, education and culture, and, in the particular context of Northern Ireland, religion or political opinion.

⁷¹ D. O'Mahony, R. Geary, K. McEvoy and J. Morison, *Crime, Community and Locale: The Northern Ireland Communities Crime Survey* (2000), pp.6-7.

⁷² K. McEvoy and A. Eriksson, op. cit n.52.

schemes.⁷³ As previously noted, during the period of the evaluation, both CRJI and GSA were operating entirely independently of the formal criminal justice system because of the ongoing legacy of suspicion and mistrust. While both the statutory and community schemes have adopted a similar approach to juvenile offenders, with, presumably, the same restorative-based goals in mind, there was little active consultation or exchange between them.

The lack of engagement between the community-based groups and the state scheme was not, however, solely attributable to reluctance on the part of either CRJI or GSA. Shortly after the Youth Conference Service began its work, the Northern Ireland Office issued guidelines to the effect that facilitators should not involve community-based organisations in the preparation or conduct of a conference so long as such groups resist co-operation with the police. The perceived dangers of the self-contained nature of the informal schemes were highlighted in their report to the CJR on restorative justice options for the province, where the authors noted the dangers of a 'façade not only for illiberal populism but also for vigilantism and community despotism.'⁷⁴ On that basis, the Northern Ireland Office insisted that any community restorative scheme had to conform to standards laid down by the state and to operate within the parameters of the formal criminal justice system. Indeed, any referrals to the projects had to come directly from a government agency.

Restorative justice thus became a hotly contested issue in the province, underlining the above-noted fears surrounding the reassertion of authority in periods of transition. Political tensions over the ownership of the new criminal justice structures were being played out not only in the areas one might have expected (such as policing, prosecutions, prisoner release, etc.), but also in the field of youth justice. The lack of any co-operation between the community-led and the state-led schemes was clearly a factor that could impede the 'legitimacy'

⁷³ Campbell et al, above n 13., p.117.

⁷⁴ Dignan and Lowey, above n 53, p26.

mission, and served to highlight the fact that normative prescription alone might not be sufficient to build trust on the ground. If community leaders perceived that they were being excluded from the criminal justice system, this could thwart efforts to make the new youth conferencing arrangements appear fair and impartial in the eyes of the communities they serve. Indeed, many of the Youth Conference Service co-ordinators interviewed by the research team felt that there was potential to work much more closely with community-based groups. One co-ordinator described communities as the 'listening ear' on the ground, and questioned how effective conferencing might be in the long run if communities themselves felt excluded from the process. Indeed, there was a broad consensus that the agency ought to work extensively outside its own organisational boundaries and seek to develop partnerships with other agencies and community groups.

With the collapse of devolution in 2002, and apparent political stalemate over the future of policing and devolution of criminal justice, questions were being raised as to how the 'new' criminal justice system was really being received on the ground. However, following the restoration of devolved government in 2007, and the recent transfer of justice powers to the Northern Ireland Assembly, perhaps one can afford to be cautiously optimistic. In February 2007, the Northern Ireland Office published a Protocol for Community-Based Restorative Justice Schemes. All programmes that wished to be approved by the State (and thus receive State funding) were required to report all cases to the police who would refer the case to the PPS before referring the matter back to the programmes. In addition, independent complaints mechanisms were to be put into place, and schemes were required to submit themselves to inspection by the Criminal Justice Inspectorate. Moreover, all cases were to be dealt with in conformity with international human rights norms and existing statutory arrangements. Ten CRJI

and four NIA schemes were subsequently accredited by the Criminal Justice Inspectorate on application by those organisations.⁷⁵

In approving the community-led schemes, the state has effectively acknowledged that a partnership approach may add a sense of moral authority to decision-making processes that have suffered from a lack of legitimacy in the past. As McEvoy and Eriksson have contended, top-down initiatives in any transitional setting should seek to build upon the existing knowledge, capacity and expertise of community organisations. Just as new pathways of communication have already been opened between the state and community through the formation of District Policing Partnerships and Community Safety Partnerships,⁷⁶ so too new relationships must now be forged between the Youth Conferencing Service, the community-based schemes as well as other state and non-state actors who may not have engaged with each other at all in years gone by.

CONCLUSIONS

Undoubtedly, the Northern Ireland youth conferencing arrangements holds a very real potential to bolster levels of legitimacy in the criminal justice system. The increased opportunities for engagement between a wide range of community-based and state-based stakeholders may, over time, allow for a better sense of procedural justice to take root within communities that formerly felt estranged from the criminal justice system. Although only a small proportion of the population will ever participate in a youth conference, research suggests that even fleeting encounters can help build legitimacy since third party accounts

⁷⁵ The Northern Ireland Office has now agreed funding for the projects which should secure the future of the projects in the short-term – see ‘Goggins to fund restorative justice plan, despite row’, *Belfast Telegraph*, 30 July 2008. It is questionable, however, whether the £600k of funding promised is capable of sustaining the projects in the longer terms.

⁷⁶ See B. Ryan, ‘Northern Ireland’s District Policing Partnerships and the Participatory Ideals’ (2008) 23 Irish Pol. St. 341.

may provide a sense of 'vicarious learning' for those who have never encountered the process.⁷⁷

In this way, providing that victims, offenders and community participants view the overall process, organisation and facilitation of a particular conference to be fair, communal perceptions of the criminal justice system as a whole may be boosted. Through mutual engagement, long-standing suspicions and misconceptions held by both state and community actors might be displaced by forging of mutual trust and respect for their respective roles in criminal justice.⁷⁸ Moreover, in the longer term, policymaking itself could be further legitimised from below if restorative programmes are institutionalised as a channel for communication between the State and citizenry.⁷⁹ Through granting the State a better insight into the problems facing victims, offenders and communities, the criminal justice system is thereby given an opportunity to be seen as more legitimate as it becomes more effective at preventing crime and assisting victims and communities. In turn, multi-level governance and civil society may be developed and a sense of 'democratic space' may act to revive politics, 'democratise democracy',⁸⁰ and transform cultures of violence.⁸¹

There is, however, a danger in portraying the Northern Ireland conflict as a straightforward clash of cultures between the state and certain sections of the community. The conflict is also inter-communal in nature, and despite recent advances in the peace process, there remains a considerable degree of mistrust and suspicion between the Unionist and Nationalist communities. Therefore, it is

⁷⁷ Ibid. There is already a burgeoning body of literature to suggest that positive encounters with the police can help traditionally excluded minority groups to feel included within new social and political structures (see further D. Smith, 'The Foundations of Legitimacy' in T. Tyler (ed), *Legitimacy and Criminal Justice* (2007)).

⁷⁸ K. McEvoy and A. Eriksson (2008), op. cit n.60.

⁷⁹ J. Braithwaite, above n 40, p.150.

⁸⁰ J. Morison, above n 63.

⁸¹ Ibid., p.158.

worth highlighting that, in addition to improving channels of communication between the State and the citizenry, restorative models also hold the potential to break down barriers between various sections of society. Since the Northern Ireland youth conferencing scheme has been rolled out across the societal divide, it will inevitably result in encounters between citizens from different cultural and political backgrounds. According to Putnam, the creation of new social networks between people of different social and cultural identities forms what he terms 'bridging social capital',⁸² which can assist in building democratic values. In the longer term, such social capital can help to reduce prejudice and collective stereotyping,⁸³ and should thereby improve our understandings of 'the other' through a long-term 'drip-effect'.

Clearly the new restorative youth conferencing arrangements have considerably enhanced levels of community participation in criminal justice. Whilst it has been noted that there have been certain difficulties involved in community participation – particularly relating to the pre-existing community-led programmes – there is already evidence that such obstacles are being transcended through a more transparent and collaborative approach to policy-making. Undoubtedly, challenges also exist for the leaders of community-led schemes, but there would now appear to be an acknowledgement from both quarters that co-operation is in their mutual interest. An approach based on partnership between the informal and formal schemes could further build public confidence in both schemes and give rise to a form of deliberative democracy, whereby the state-led and community schemes would open themselves up to mutual scrutiny, each checks on the perceived disadvantages and risks of injustice of the other.⁸⁴

⁸² As opposed to 'bonding' social capital, which involves social networks between homogeneous groups of individuals who see themselves as sharing the same social identity.

⁸³ D. Mutz, 'Cross-Cutting Social Networks: Testing Democratic Theory in Practice.' (2002) 96 *Amer. Pol. Sci. Rev.* 111.

⁸⁴ D. Roche, 'Restorative Justice and the Regulatory State in South African Townships' (2002) 42(3) *Br. J. Crim.* 514.

In this sense, restorative youth conferencing can act as both a vehicle for, and beneficiary of, peace-building. However, in order for such a partnership to work effectively, the underlying conditions must be right. This will depend not only on the 'stage of development' which the community is at,⁸⁵ but also upon the rate of transition in a post-conflict setting. Perhaps, in the case of Northern Ireland, it is still too soon to expect the reforms borne out of the CJR to have won over the support of the entire community. Although the future state of devolved government appears much more certain that it once did, it should be borne in mind that Northern Ireland remains very much in the midst of transition rather than at the end of a process. It is still very much a politically divided society. By the same token, however, the strong history of civil society and vibrant and dynamic community activism, coupled with its transitional setting, means that there is a rich and fertile ground in which to cultivate the seeds of criminal justice reform.

It remains to be seen what the future holds. Northern Ireland is unique in the international field in that there are two sets of restorative justice programmes now poised to work alongside each other. While the politicisation of the concept may not have helped its development in the short term, ironically the prominence afforded to it may instil a sense of public awareness of how it works and how restorative justice might achieve its goals in practice. Indeed, restorative principles are evident in the 'Eames-Bradley Report' (the Report of the Consultative Group on the Past) which proposed the establishment of a 'legacy commission' to investigate deaths and past atrocities.⁸⁶ Whilst its investigations

⁸⁵ M. Schiff, 'Models, challenges and the promise of restorative conferencing strategies' in A. von Hirsch, J. Roberts, A. Bottoms, K. Roach and M. Schiff (eds), *Restorative Justice and Criminal Justice: Competing or Reconcilable Paradigms* (2003).

⁸⁶ The Eames-Bradley report was launched in Belfast in January 2009 (see www.cgpnri.org). The level of controversy surrounding the report reflects the fact that there is a profound lack of consensus within Northern Ireland as to how to deal with the legacy of the Troubles. See further

will be conducted with a view to prosecuting perpetrators rather than the sole task of recovering facts,⁸⁷ many victims' families can at least anticipate being offered some form of symbolic reparation through the provision of information about what precisely happened to their loved ones.⁸⁸ We hope that, in the longer term, the youth conferencing scheme will have some role to play not only in restoring individual victims and offenders, but also through restoring a degree of trust among the citizenry in the capacity of the state to address young offenders in a fair and legitimate manner. Ultimately, however, the long-term integrity and sustainability of the youth conferencing arrangements is tied to the much larger project of political transition. Only with the passage of time shall it become clear if the Criminal Justice Review has succeeded in its ultimate goal of developing a dynamic and lasting partnership between the State and all sections of the community.

C. Lawther, "'Securing" the past: policing and the contest over truth in Northern Ireland' (2010) 50(3) *Br. J. Crim.* 455-473; F. Ní Aoláin, 'Truth Telling Accountability and the Right to Life in Northern Ireland' (2002) 5 EHRLR 50; B Rolston and P Scraton, 'In the full glare of English politics: Ireland, inquiries and the British State' (2005) 45(4) *Br J Crim* 547; P Lundy and M McGovern, 'Attitudes towards a Truth Commission for Northern Ireland in Relation to Party Political Affiliation' (2007) 22(3) *Irish Pol St* 321.

⁸⁷ This is a marked difference with many other truth commissions established elsewhere – most notably the TRC where perpetrators were offered an amnesty from prosecution in return for giving evidence.

⁸⁸ Somewhat controversially, the report proposed that an 'ex gratia recognition payment' of £12,000 GBP will be offered to all the families of all those who were killed in the Troubles, including members of paramilitary organisations. However, the Government subsequently announced that this proposal would not be implemented as there was a lack of public consensus on the issue: 'Government rejects £12,000 payments for Troubles victims', *The Times*, 25 February 2009.